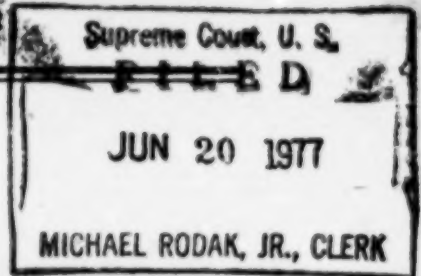


IN THE



Supreme Court of the United States

OCTOBER TERM, 1976

No.

76-1801

LISA GORDON SMITH RIVET, Administratrix
of the Succession of ERA AGNES PEAVY, ETC.,
Petitioners,

VERSUS

J. C. PENNEY COMPANY, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

R. C. EDWINS & ASSOCIATES
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976

NO.

LISA GORDON SMITH RIVET, Administratrix
of the Succession of ERA AGNES PEAVY, ETC.,
Petitioners,

VERSUS

J. C. PENNEY COMPANY, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment herein of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on March 30, 1977, petition for rehearing denied on April 26, 1977.

OPINIONS BELOW

The opinion of the District court, rendering a judgment of dismissal in response to respondent's motion for summary judgment is unreported. The Court of Appeals affirmed the

judgment of dismissal rendered in the district court but did not assign reasons. The denial of petitioner's request for a rehearing was also unaccompanied by an opinion.

JURISDICTION

The judgment of the United States Court of Appeals was entered on March 30, 1977, petition for rehearing denied on April 26, 1977. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

QUESTIONS PRESENTED

1. Considering Rule 56 of the Federal Rules of Civil Procedure and the jurisprudence interpreting same, was the trial judge correct in granting defendant's motion for summary judgment?

2. Considering the law as regards a survival and wrongful death action, do the deceased's grandchildren, as her sole legal heirs, have a cause of action under *La. Civil Code*, Art. 2315, notwithstanding "grandchildren" are not specifically mentioned as beneficiaries?

3. Interpreting *La. Civil Code*, Art. 2315, to exclude petitioners, the grandchildren of the deceased, from that class of beneficiaries entitled to recover under that code article, denied petitioners equal protection guaranteed by the Fourteenth Amendment and represented an invidious discrimination in view of the United States Supreme Court decisions recognizing the rights of illegitimate children to recover from the death of their parents and ranks legitimate grandchildren lower than illegitimate children with regard to their right to sue for damages resulting from the death of their grandparent.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provision involved is the equal protection clause of the Fourteenth Amendment which provides in pertinent part: "No state shall . . . deny to any person its jurisdiction, the equal protection of the laws.

The statutes involved are:

1. *Federal Rules of Civil Procedure* - Rule 56 (c) which provides in pertinent part:

"The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, showing that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law".

2. *La. Civil Code* Art. 2315 which provides "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.

The right to recover damages to property caused by an offense or quasi offense is a property right which, on the death of the obligee, is inherited by his legal, instituted, or irregular heirs, subject to the community rights of the surviving spouse.

The right to recover all other damages caused by an offense or quasi offense, if the injured person dies, shall survive for a period of one year from the death of the deceased in favor of: (1) the surviving spouse and child or children of the deceased, or either such spouse or such child or children; (2) the surviving father and mother of the deceased, or either of them,

if he left no spouse or child surviving; and (3) the surviving brothers and sisters of the deceased, or any of them, if he left no spouse, child, or parent surviving. The survivors in whose favor this right of action survives may also recover the damages which they sustained through the wrongful death of the deceased. A right to recover damages under the provisions of this paragraph is a property right which, on the death of the survivor in whose favor the right of action survived, is inherited by his legal, instituted, or irregular heirs, whether suit has been instituted thereon by the survivor or not.

As used in this article, the words "child," "brother", "sister", "father", and "mother" include a child, brother, sister, father, and mother by adoption, respectively."

3. *La. Civil Code* Art. 3556 (8) which provides: "Whenever the terms of law, employed in this Code, have not been particularly defined therein, they shall be understood as follows:

(8) Children - Under this name are comprehended, not only the children of the first degree, but the grandchildren, great-grandchildren, and all other descendants in the direct line."

STATEMENT OF THE CASE

This is a wrongful death and survival action under *La. Civil Code* Art. 2315 brought as a result of the deceased, Mrs. Era Agnes Peavy, having been burned and subsequently dying as a result of a garment which she was wearing accidentally catching fire. The garment was manufactured by and purchased from

the defendant.

Made plaintiffs in the suit are the four grandchildren of the deceased; namely, Lisa Gordon Smith Rivet, Katherine Smith Doss, Gordon Smith, Jr., and Robert Scott Smith. Plaintiff, Lisa Gordon Smith Rivet, also sues in her capacity as the Administratrix of the Succession of her grandmother. Gordon Smith sues as the natural tutor of the minors, Gordon Smith, Jr., and Robert Smith.

Made defendant in the suit is J. C. Penney Company, Inc., the vendor and manufacturer of the garment in question.

After issue was joined, defendant filed a motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. The basis of defendant's motion being in effect, that plaintiffs, as grandchildren, had no right of action to maintain the suit because *La. Civil Code* Art. 2315 does not specifically name grandchildren among the designated beneficiaries, and therefore, the litigation should be dismissed for lack of a right of action. Within the appropriate delays allowed by the federal rules, plaintiffs filed an opposition to defendant's motion for summary judgment.

Subsequently, the day before defendant's motion was to be orally argued before the presiding judge, the Honorable E. Gordon West, plaintiff's counsel was informed that Judge West had decided the motion in favor of mover and the case was dismissed. In his reasons for judgment, Judge West held that *La. Civil Code*, Art. 2315, did not provide plaintiffs with a right of action because succession representatives and grandchildren are not included in the class of persons entitled to sue under that article, and no one, other than the specific classes of persons named in the article may sue under it.

Petitioners subsequently appealed the decision of the district

court to the Fifth Circuit Court of Appeals. After hearing oral arguments, the court affirmed the judgment of dismissal without assigning written reasons. Petitioner then requested a rehearing which request was denied.

REASONS FOR GRANTING THE WRIT

I.

Considering Rule 56 of the *Federal Rules of Civil Procedure*, the trial judge was incorrect in granting defendant's motion for summary judgment. It is well settled that the purpose of summary judgment is not to cut litigations off from their right to trial if they really have issues to try. *National Life Insurance Co. v. Silverman*, 454 F.2d 899, 147 U.S. App., D.C. 56. Subparagraph (c) of Rule 56 specifies that the moving party satisfy two requirements before the court may grant the relief sought. Mover must first show that there exists no genuine issue as to any material fact and, secondly, that he is entitled to judgment as a matter of law. *Pitts v. Shell Oil Co.*, 463 F.2d 331. Appellants submit that it is all too frequent that these two, distinct and necessarily separate requirements are merged by the moving party into one requirement under the mistaken assumption that satisfaction of one satisfies the other. It is respectfully submitted that the trial judge committed this error in finding, as he must have found, that the defendant was entitled to judgment as a matter of law.

As will be shown in the succeeding paragraphs, a recent decision by the Louisiana Supreme Court has seriously questioned prior judicial interpretations of *La. Civil Code* Art. 2315 which regarded the listing of beneficiaries within that code article as exclusive. Furthermore, the Fourth Circuit Court of Appeal of the State of Louisiana has rejected prior jurisprudence denying grandchildren a right of action.

Considering the unsettled state of Louisiana jurisprudence on this point of law, the appellee was not entitled to judgment "as a matter of law". Therefore, the decision of the trial court in granting the motion for summary judgment was in error.

II.

The district court decision and affirmance by the court of appeals erred in its interpretation of *Civil Code* Art. 2315 and should be reviewed by this Honorable Court. Art. 2315 of the *La. Civil Code* designates three classes of beneficiaries who have the right to bring a wrongful death or survivor's action. These are as follows: 1) surviving spouse and children of the deceased; 2) the surviving mother and father of the deceased if he left neither spouse nor child; and 3) the surviving brothers and sisters of the deceased if he left neither spouse, children, nor parents.

Civil Code Art. 3556 states:

"Whenever the terms of law, employed in this Code have not been particularly defined therein, they shall be understood as follows . . .

(8) Children - under this name are comprehended, not only the children of the first degree, but the grandchildren . . . and all the descendants in the direct line". (Emphasis provided)

As *Civil Code* Art. 2315 nowhere defines the term "children", Art. 3556 should control; thus, the appellants have a right of action under Art. 2315.

Two prior cases have considered this point of law: *Hunt v. New Orleans Ry. & Light Co.*, 140 La. 524, 73 So. 667 (1916)

and *Walker v. Vicksburg S. & Pry. Co.*, 110 La. 718, 34 So. 749, (1903), both of which rejected grandchildren as beneficiaries under Art. 2315. However, it must be noted that the most recent of these case was decided more than fifty years ago.

In *King v. Cancienne*, 316 So.2d 366 (La., 1975), in its decision that a good faith putative spouse has a right of action under *La. Civil Code* Art. 2315, the Supreme Court of Louisiana repudiated common-law narrow construction of Art. 2315 and severely criticized the *Walker* and *Hunt* cases, *supra*. The decision further questioned whether the named beneficiaries under that Code Article are merely illustrative rather than exclusive as has been the past interpretation; however, the court pretermitted comment on this issue, feeling it to be unnecessary to a decision based on the facts of that case. In 1976, the Fourth Circuit Court of Appeal had occasion to consider whether grandchildren were within the ambit of Art. 2315 in *Vial v. Batiste*, 332 So.2d 512 (4th Cir., 1976). Although the author of the opinion held that the term "children" does not include grandchildren, the remaining two judges concurred only in the result because they felt that to decide contrary to prior jurisprudence would be in excess of their authority as appellate judges. In his concurring opinion, Judge Lemmon plainly rejected *Walker* and *Hunt*, *supra*, feeling that under the civilian approach, the definition of Art. 3556 should control the interpretation of "children" in Art. 2315. From the above, it is clear that this area of Louisiana jurisprudence is unsettled.

III.

The decision below and its interpretation of *La. Civil Code*, Art. 2315 to exclude grandchildren *per se* from that class of beneficiaries entitled to a right of action should be reviewed because it constitutes a violation of the appellants' right to

equal protection under the laws as guaranteed by the Fourteenth Amendment. *Levy v. Louisiana*, 391 U.S. 68, 71, 88 S.Ct. 1509, 1511 (1968), held that "denial to illegitimate children of a right to recover for the wrongful death of their mother constituted an invidious discrimination against them." Although the court recognized the broad prower of a state in making classifications, it noted that such a classification may not constitute an invidious discrimination against a specific class, and further that the means selected must substantially further state the purpose.

In a later case, *Weber v. Aetna Casualty & Surety Co.*, 406 U.S., 164, 92 S.Ct. 1400, the court stated that the preference in the Louisiana workmen's compensation statute of legitimate over illegitimate children as beneficiaries was an invidious discrimination and a violation of the Equal Protection clause. The test, as stated therein, was essentially a balancing of interests; namely, what legitimate state interest does the class promote as opposed to the fundamental personal rights possibly endangered by the classification.

In the case under consideration, appellants are the grandchildren and sole surviving relations of the deceased, and under a civilian interpretation of *La. Civil Code* Art. 2315 are members of that class of people entitled to recover for the wrongful death of their grandmother. Article 2315, is a "state-created compensation scheme designed to provide close relatives and dependants of the deceased a means of recovery for his often abrupt and accidental death." *Weber v. Aetna Casualty & Surety Co.*, *supra*. Surely, the appellants qualify as close relatives of Mrs. Peavy and are entitled to some compensation for their loss. Failure to allow appellants a right of action could only end in the inequitable result of freeing the tortfeasor who caused this death from the liability due to the fortuitous circumstance that Mrs. Peavy was predeceased by her daughter who was the mother of the appellants. Mrs. Peavy had no other surviving relatives.

Under the jurisprudence which has interpreted Art. 2315, it is possible that the rights of a grandchild who is a direct descendant of the deceased may be superceded by a brother or sister who is of the collateral line. This is not a fair result, nor does it rationally serve to carry out the intent of the legislators in providing for a wrongful death and survivor's action.

The formation of the wrongful death statutes was the direct result of the states' interest in providing the dependants of the deceased with continued support. A. A. White, "The wrongful Death Statute - A Constitutional Problem", 12 *Houston L. Rev.*, 25, 50. In so doing, the State of Louisiana defined that class of people entitled to recover. *Weber v. Aetna Casualty & Surety Co.*, supra, in its discussion of the rationale of the state in limiting the action to defined beneficiaries stated, "States frequently draw an arbitrary line in wrongful death statutes to facilitate potentially difficult problems of proof." As stated previously, under a strict reading of the code, appellants are "children" of the deceased and entitled to bring this action. There are no difficulties of proof involved in determining their possession of this right of action. Neither are there any other relatives upon whose rights the appellants would infringe in maintaining this suit. In his concurrence in *Vial v. Batiste*, supra, Judge Lemmon criticized the *Hunt* decision which was based on the theory that the legislature could not have intended to prefer minor grandchildren to major children. He further stated:

"This interpretation denied a right of action to all grandchildren rather than allowing the action and adjusting the amount of recovery according to whether the grandchildren were dependent for support". (Emphasis provided)

Clearly, this is a much more rationale approach than one which denies all grandchildren any right of recovery, regardless of

their circumstances of the existence of other beneficiaries with a right of action.

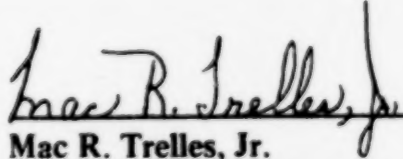
The question of whether equal protection is denied when a state denies recovery to the entire class of grandchildren for the wrongful death of their grandmother has not been decided by this Court. However, this question is presented in the case at bar and this Court should grant certiorari to resolve it.

CONCLUSION

For the reasons aforesaid, it is respectfully prayed that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

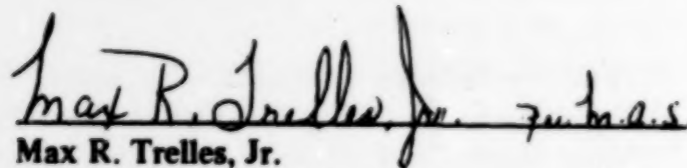
R. C. EDWINS & ASSOCIATES


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504/383-5071
Counsel for plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Petition for Writ of Certiorari to the United States Court of Appeals has this day been forwarded to all counsel of record by depositing same in the U.S. Mail, sufficient postage affixed, properly addressed.

Baton Rouge, Louisiana, this 25th day of May, 1977.


Max R. Trelles, Jr.

August 4, 1975
No. 5998

AO 146 (Mar. 1953)

NOTICE

**UNITED STATES DISTRICT COURT
FOR THE
MIDDLE DISTRICT OF LOUISIANA**

July 31, 1975

LISA GORDON SMITH RIVET,)
Admin., etc., ET AL)
v.) No. 75-122, Civil Action
J. C. PENNEY COMPANY, INC.)

TAKE NOTICE that you are hereby notified, pursuant to Rule 77 (d), of the entry on this date of the Court's order dismissing this case.

CHARLES H. BANTA

Clerk, United States District Court.

By /s/ Mary Ann Hais

Chief Deputy Clerk.

To R. C. Edwins, Esq.
Curtis R. Boisfontaine, Esq.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

MINUTE ENTRY:
JULY 30, 1975
WEST, J.

LISA GORDON SMITH RIVET,
Administratrix of the Succession
of ERA AGNES PEAVY, Individually,
etc., ET AL

CIVIL ACTION

NUMBER 75-122

VERSUS

J. C. PENNEY COMPANY, INC.

* * * * *

This matter is before the Court on defendant's motion for summary judgment. This suit is brought by the plaintiff, Lisa Gordon Smith Rivet, as Administratrix of the Succession of Era Agnes Peavy, deceased, individually and as representative of four named grandchildren of the deceased, Era Agnes Peavy. The deceased had only one child, and that child died in 1968, some five years before the accident involved in this suit. That deceased left four children whom the plaintiff in this case is attempting to represent. Plaintiff brings this suit as a diversity action and relies on Article 2315 of the Louisiana Revised Civil Code as the basis of the plaintiff's action. Plaintiff contends that the deceased bought a garment from the defendant, J. C. Penney Company, Inc., and that subsequent to the purchase, the garment caught fire, resulting in the death of the decedent. Plaintiff alleges negligence on the part of J. C. Penney

Company, Inc. and demands damages under the provisions of Louisiana Revised Civil Code Article 2315. It is the contention of the defendant in this motion that Article 2315 does not provide these particular plaintiffs with a right of action in this case. We agree with defendant's contention.

Article 2315 of the Louisiana Revised Civil Code specifically sets forth the class of persons entitled to sue for damages under that Article. Succession representatives and grandchildren are not included. No one other than the specific classes of persons named in the Article may sue thereunder. See *Levy v. State, Char. Hosp. of La. at N. Orleans Bd. of Ad.*, 216 So.2d 818 (La.S.Ct. 1968). Therefore:

IT IS ORDERED that the defendant's motion for summary judgment be, and it is hereby GRANTED, and this case is hereby DISMISSED.

/s/ E. Gordon West

UNITED STATES DISTRICT JUDGE

AUTHORITY:

Levy v. State, Char. Hosp. of La. at N. Orleans, supra.

Collins v. Becnel, 297 So.2d 506 (La. App. 4th Cir. 1974).

Hunt, et al v. New Orleans Ry. & Light Co., 73 So. 667 (La. S. Ct. 1917).

Young v. McCullim, 74 So.2d 339 (La.App. 1st Cir. 1954).

R. C. Edwins, Esq.

Curtis R. Boisfontaine, Esq.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 75-3322

LISA GORDON SMITH RIVET,
Administratrix of the
Succession of ERA AGNES
PEAVY, ETC.,

Plaintiff-Appellant,

v.

J. C. PENNEY COMPANY, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Louisiana

(March 30, 1977)

Before GEWIN, AINSWORTH and SIMPSON, Circuit Judges.

PER CURIAM:

Affirmed on the basis of the opinion of District Judge E.
Gordon West entered July 30, 1975.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 75-3322

LISA GORDON SMITH RIVET,
Administratrix of the
Succession of ERA AGNES
PEAVY, ETC.,

Plaintiff-Appellant,

versus

J. C. PENNEY COMPANY, INC.,

Defendant-Appellee.

Appeal from the United States District Court for the
Middle District of Louisiana

ON PETITION FOR REHEARING

(APRIL 26, 1977)

FILED: April 26, 1966

Before GEWIN, AINSWORTH and SIMPSON, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby Denied.

ENTERED FOR THE COURT:

/s/ Robert Ainsworth, Jr.

United States Circuit Judge

Form 703-2